MOTION FILED MAR 3 1961 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 6

CHARLES W. BAKER, *et al.*,

Appellants,

v.

JOE C. CARR, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF AS *AMICI CURIAE*

For John F. English, Eugene H. Nickerson, Shirley M. Raines, Bertram Harnett, Anthony M. Salvati, Walter A. Lynch, Jr., Ray M. Brand, Richard L. Maloney, Norman Levine, Ferdinand I. Haber, Henry A. Rigali, Joseph F. McKnight, Marion Groves, H. P. Mitchell, George L. Erb,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, *et al.*,

Appellants,

v.

JOE C. CARR, *et al.*,

Appellees.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The above named residents of Nassau County, New York, hereby respectfully move for leave to file a brief annexed hereto as *amici curiae* in this case. The consent of the appellants was granted, but the consent of the appellees was refused.

These Nassau County residents are all qualified voters in that county and state, and, like the appellants, are discriminated against in voting for representatives in both houses of their state legislatures by reason of the unequal apportionment of voting districts.

The very short brief which these residents seek to submit will argue that the interest in the fair apportionment of state legislative seats in an essential element under the Fourteenth Amendment of equal protection of the laws.

Appellants' argument is directed primarily to the situation in Tennessee. The *amici curiae* believe that it will

be helpful to the Court to have before it the effects of unfair apportionment in the State of New York.

Dated: March 2, 1961.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, *et al.*,
Appellants,

v.

JOE C. CARR, *et al.*,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF AS *AMICI CURIAE*

For John F. English, Eugene H. Nickerson, Shirley M. Raines, Bertram Harnett, Anthony M. Salvati, Walter A. Lynch, Jr., Ray M. Brand, Richard L. Maloney, Norman Levine, Ferdinand I. Haber, Henry A. Rigali, Joseph F. McKnight, Marion Groves, H. P. Mitchell, George L. Erb,

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Statement of Interest

This brief *amici curiae* is filed on behalf of the above named residents of Nassau County, State of New York, individually. They are all qualified voters in that county and state, and, like the appellants, are discriminated against in voting for representatives in both houses of their state legislature by reason of the unequal apportionment of voting districts.

The persons on whose behalf this brief is filed have a vital interest in the fair and adequate representation of citizens of all parts of a state in its legislature. A holding in the case at bar that the citizens of a state are not entitled to the only remedy available to them, *i.e.*, a judicial remedy, for a gross, deliberate and cynical debasement of their rights to vote for their state legislators, will condemn the *amici curiae* to a virtually permanent inferior status in the choice of representatives of the New York State legislature.

Argument

The apportionment of seats in both the Assembly and the Senate of the New York legislature discriminates heavily against Nassau County. For example, in the Assembly each of the six representatives of Nassau County represents an average of approximately 212,500 persons, whereas the representative from Schuyler County represents a mere 15,000 persons. In other words, the vote of a resident of Schuyler County is worth more than fourteen times as much as a vote of a resident of Nassau County. Nassau County has only six Assembly seats. Yet thirty-one upstate counties, with a combined population almost the same as Nassau, have thirty seats. It thus takes the vote of five Nassau County residents to equal the vote of one of these upstate voters. New York Constitution, Article 3, §5.

In the Senate of the State of New York a similar situation prevails. Each of Nassau County's three senatorial districts has an average population of 433,000 persons, or two and one-half times as many as the least populous upstate district. Because of the provision in the New York Constitution, Article 3, §4, that "No county shall have four or more senators unless it shall have a full ratio [2% of the population] for each senator," Nassau County will not receive a single additional Senator under reapportionment due to the new census. This is so although the population of the county has doubled since 1950 to a figure of about 1,300,000. Yet Suffolk and Monroe Counties, with half or less than half of Nassau County's population, will have exactly the same number of Senate seats, namely, three.

Nassau County citizens are thus starkly and deliberately discriminated against in both houses of the legislature. As a practical matter, a rural upstate legislator is not faced with the problems which are attendant on explosive growth of population such as has taken place in the suburbs. He has not been and will not be sympathetic to these problems, e.g., aid to education, housing, air and water pollution, and the like. This will inevitably mean either that these problems will find no solution or that suburban eyes will turn increasingly to the Federal Government.

There is set forth in the appendix to this brief more details as to the discrimination practiced against Nassau County. For present purposes it is sufficient to state that the discrimination is extreme and indeed deliberate.

The citizens of Nassau County quite plainly have no redress except through the courts. The Constitution of 1894 (the apportionment provisions of which are still in effect) was expressly designed to assure that the large counties would always be under-represented. The New

York State legislature is and has been for many years, as a result of the very discrimination described, controlled by persons elected by a minority of the citizens. Those legislators have a vested interest in unfair apportionment. Yet under the New York State Constitution a new and fair method of apportionment can only be initiated within the next eighteen years by the legislature itself by passing a constitutional amendment for submission to the people. A procedure is provided in Article 19, 2 of the Constitution whereby the people may vote every twenty years on the proposition whether a convention shall be held to revise the Constitution. However, the delegates to that convention are almost all elected from the senatorial districts which are so unfairly districted (less than ten per cent being elected at large).

This brief will not rehearse the arguments so ably presented by appellants, but will direct itself to one main point. It is addressed to those who believe that a free people must find the vindication of their most vital interests not so much through the intervention of courts as through "the vigilance of the people in exercising their political rights." Opinion of Frankfurter, J., in *Colegrove* v. *Green*, 328 U. S. 549, 556 (1946). This view is summarized in the first Flag Salute Case as follows: "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people." *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586, 600 (1940) (per Frankfurter, J.).

Time and again, when this Court has been urged to intervene and to overturn legislation of state or nation, we have been informed by some members of the Court that recourse should in most instances be had to the political influence of the citizenry on its legislative bodies

and not to a judiciary insulated from the people. This has been said in matters involving the most fundamental interests in our society.

A few examples will suffice. In *American Federation of Labor* v. *American Sash Co.*, 335 U. S. 538, 556 (1949) the Court upheld a provision of the Arizona Constitution providing that no person should be denied employment for non-membership in a union. Frankfurter, J., concurring, stated:

> "But a democracy need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness by the people there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself."

Similarly, where the Court upheld an ordinance forbidding the use of a sound truck under certain circumstances, *Kovacs* v. *Cooper*, 336 U. S. 77, 97 (1949), Frankfurter, J., concurring, stated that the matter before the Court was "for the legislative judgment controlled by public opinion."

The same philosophy was articulated by Frankfurter, J., concurring in *Dennis* v. *United States*, 341 U. S. 494, 517, 525, 552 (1951), in which the Court affirmed the conviction, under the Smith Act, of leaders of the Communist Party. The Justice stated:

> "Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. * * * In sustaining the power of Congress in a case like this nothing irrevocable is done. The democratic process at all events is not impaired or restricted. Power and responsibility remain with the people and immediately with their representatives."

The philosophy espoused by these opinions is indeed daring. But it presupposes more than an informed and alert electorate. It also contemplates that the democratic process shall not be "impaired or restricted," that the legislative judgment will indeed be "controlled by public opinion," and that the "alertness," and "vigilance" of the people over their representatives will not be frustrated by grossly unfair apportionment.

In short, the view of the above cited opinions has as its premise that the legislative body is representative and not unrepresentative. It would be a mockery indeed to inform us that the vindication of our most vital interests lies with the legislature and then to permit such an apportionment of legislative districts as to make such vindication impossible.

The opinion of Frankfurter, J., in *Colgrove* v. *Green*, 328 U. S. 549 (1946), is by no means inconsistent with the view of the appellants that the Court should intervene in this case. That case involved an apportionment of Congressional districts. The opinion of Frankfurter, J., stated, 328 U. S. at 556, that "The remedy for unfairness in districting is to secure State legislators who will apportion properly, or to invoke the ample power of Congress." A remedy for unfair Congressional districting may perhaps lie in the election of responsive state legislators. But where is the remedy for unfairness in districting the state legislatures themselves if one man's vote is worth fourteen times that of another's? *Quis custodiet ipsos custodes?*

If we are to take seriously the view that the courts should exercise restraint in interfering with legislative judgments upon interests we prize so highly as those affirmed in the Bill of Rights, the courts must assure that the legislatures are not so districted as to be unresponsive to public opinion.

It is respectfully submitted that the Court should find that the judgment below is inconsistent with the Fourteenth Amendment and should be reversed.

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APPENDIX

How Article 3, §§ 4 and 5, of the New York State Constitution Will Affect Reapportionment of Legislative Seats Under the 1960 Census

Assembly

The State's citizen population of 16,234,200 is divided by the Constitutional 150 members to give a "first ratio" of 108,230. Every county with less than 1½ first ratios of citizen population gets one Assembly seat (except Hamilton, which shares one with Fulton). This uses up 44 seats. Every county with more than 1½ first ratios gets two seats. This uses up 34 more seats, leaving 72, which are allotted among counties with more than two first ratios, as follows.

Two first ratios are subtracted from the citizen population of these counties (representing the two seats already allotted them). The total of the remaining population is divided by the 72 remaining seats, to yield a "second ratio" of 137,425. To each county is given a number of seats equal to the number of full second ratios its remaining population contains. After this is done, five seats are left. These go, in order, to the counties with the highest population remainders.

As the result of this distribution, the 31 smallest counties, with 7.9% of the population, will keep their present 30 seats, or 20.0% of the total seats. They will average 42,700 citizens per seat. New York City, with 45.7% of the population, will have 56 seats, or 37.3%, and will average 132,500 citizens per seat. The six biggest counties outside New York (Nassau, Erie, Westchester, Suffolk,

Monroe and Onondaga), with 29.2% of the population, will have 38 seats or 25.3% of the seats, and will average 125,000 citizens per seat.

Senate

Distribution of Senate seats starts from the biggest counties and works down. The State's citizen population is divided by 50, yielding a "first ratio" of just under 325,000. The six counties with more than three first ratios (6%) of the population (Kings, Queens, New York, Bronx, Nassau, Erie) get one seat for each full first ratio. The Constitution provides that no county shall have four or more Senators unless it shall have a full first ratio for each seat. (This means, for example, that Kings, with 7.77 ratios, gets only seven seats. New York, with 4.81 ratios, gets only four seats. Nassau, with 3.93 ratios, gets only three seats. Thus there is a wastage of population, and the 26 seats that these counties will get in 1964 actually average 366,200 population each, instead of the hypothetical 325,000 first-ratio figure.)

The number of seats newly allotted to each of these counties is compared with the number it had in 1894. Any decrease is disregarded, but any increase is added to 50 to determine the total number of seats. The only increase this time is Queens' and Nassau's eight seats, compared with the one seat Queens had in 1894 (before Nassau split off). So the total number of seats is 57, instead of the present 58.

The 26 seats going to the six biggest counties are subtracted from the total, and the remaining seats are divided into the remaining citizen population (6,712,600). This yields the "second ratio," 216,500, which is nearly 150,000 smaller than the true first ratio of 366,200.

It is on the basis of this smaller second ratio that Senate seats are allotted to the rest of the counties—and furthermore, the larger ones, such as Suffolk, Monroe and Onondaga, get an additional seat for each additional second ratio or major fraction thereof. Thus Monroe, with a citizen population of 573,800 and 2.65 second ratios, gets three seats. (However, Westchester, with a citizen population of 782,400 and 3.61 second ratios, cannot have four seats, because it bumps into the Constitutional restriction against four or more seats without a full first ratio for each seat!) The smaller counties are grouped into senate districts as nearly equal to the second ratio as possible.

Because of the discriminatory features of the formula, the 47 smallest counties, with 15 Senate seats, average only 206,000 citizens per seat. The second-ratio counties combined average 216,000 per seat, while the first-ratio counties average 366,000 per seat. The first-ratio counties, with 58.7% of the citizen population, get only 45.6% of the seats, while the 47 smallest counties, with 19.0% of the population, get 26.3% of the seats.